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CANONS OF PROFESSIONAL ETHICS, THEIR GENESIS AND HISTORY

If one would know the beginnings of the canons of professional ethics which guide the legal profession in America today, he must go back over half a century and study closely the proceedings of the annual meetings of the old Alabama State Bar Association, for there is to be found the source of our present standards of professional ethics.

Fifty-one years ago, during the summer of 1881, Thomas Goode Jones, of Montgomery, was Chairman of the Alabama State Bar Association's "Committee on Judicial Administration and Remedial Procedure." Col. Jones was a very hard working and enthusiastic member of the Association, studied the problems that confronted the legal profession and took an active part in the development of every idea that gave promise of elevating the ethical standards of the profession.

FIRST SUGGESTION OF A CODE

In the report which Col. Jones made, as Chairman for his committee that year, the recommendation to which he devoted most of thought and time was "that the Association appoint a committee, with instructions to report a Code of Legal Ethics for consideration at the next annual meeting."

Col. Jones made his suggestion in these words:

"While there are standard works of great eminence and authority upon legal ethics, these are not always accessible. In many instances, practices of questionable propriety are thoughtless rather than willful and would have been avoided if any short, concise Code of Legal Ethics stamped with the approval of the Bar had been in easy reach. Nearly every profession has such a work which is treasured by its members. With such a guide pointing out in advance the sentiment of the Bar against practices which it condemns, we would find them disappearing, and should any one be bold enough to engage in evil practices the Code would be a ready witness for his condemnation and carry with it the whole moral power of the profession. . . . What just

complaint exists of lawyers stirring up strife, or being swift to originate or initiate litigation, would vanish when the profession throughout the State raises its warning voice in advance against these pernicious practices. The lawyer who shall frame such a Code need ask no greater nor more enduring fame. Nothing would more effectively promote the ends of justice or tend more to advance judicial administration."

Col. Jones was moved to make this suggestion because of the things he had seen during the course of a varied and extensive practice of some fifteen years. With several young men he had studied law in the night class conducted at Montgomery by Abram J. Walker, the able and beloved Chief Justice of the Supreme Court of Alabama from 1859 to 1868. Col. Jones was very much interested in the welfare of the younger lawyers of the Montgomery Bar and gave generously of his time aiding them in the solution of their problems. He had their confidence and respect and was frequently consulted by them on questions of professional ethics. He kept on his desk a copy of "An Essay on Professional Ethics" by Judge Sharswood, of Pennsylvania, one of the most distinguished lawyers, law professors and jurists of his time. Judge Sharswood's essay was first published in 1854, but not many copies of it were owned by the legal profession in Alabama. Col. Jones frequently consulted Judge Sharswood's helpful essay, and no doubt many of its principles and standards found their way into the Code which Col. Jones was to have the honor of drafting.

ALABAMA BAR ASSOCIATION APPOINTS COMMITTEE

The suggestion made by Col. Jones, for some unknown reason, was not acted upon by the Bar Association until it met at Montgomery a year later. At that time Major Henry C. Semple, a Montgomery lawyer, moved that a committee of three be appointed to report a Code of Ethics to the next meeting of the Association. He provided in his motion that Col. Jones should be the chairman of the committee. This motion was promptly carried. However, due to some mis-

understanding, the members of the committee were not named. Col. Jones, who had been named chairman in the resolution, did not feel that it would be proper for him to proceed alone. He regarded the duty a very delicate and important one and wished to have the counsel and experience of a full committee.

This delay did not quench the enthusiasm of Col. Jones for the drafting of a Code of Legal Ethics. We find him in 1883, when the Association held its fifth annual meeting at Blount Springs, serving as chairman of its executive committee. Again he brought the matter to the attention of his brother lawyers in his report saying:

"Your committee believe that a Code of Legal Ethics would go very far, using the language of our Constitution, 'to advance the science of jurisprudence, to promote the administration of justice throughout the state, uphold the honor of the profession of the law and establish cordial intercourse among the members of the Bar of Alabama.'"

Col. Jones's executive committee then recommended the appointment of a special committee to consist of three, with instructions to report to the next annual meeting a Code of Legal Ethics for the Bar of Alabama. Later during that session of the Association the special committee was appointed. It consisted of Col. Thomas Goode Jones, Montgomery, Chairman; Col. Richard Orrick Pickett (1814-1898), a distinguished soldier of the Southern Confederacy and one of the leading lawyers of North Alabama; and Col. Daniel Shipman Troy (1832-1895), also a veteran of the Confederacy, and one of the ablest lawyers in the state. Neither Col. Pickett nor Col. Troy took any active part in the work of drafting the Code, but it appears that Col. Jones submitted to them, before presenting it to the Association, the draft of the Code which he had prepared and that it met with their hearty approval.

PREPARATORY WORK

The next meeting of the Alabama State Bar Association was held at Birmingham in 1884. Col. Jones was present, and, when the report of the special committee on a Code of Legal Ethics was called for, said he regretted the necessity of asking additional time for his committee. "Drafting a Code of Ethics," he stated, "is a matter of such importance to the profession that it can not be done hurriedly. A great deal of preparatory work has been accomplished. Letters have been written to many eminent lawyers and judges asking suggestions, and with the aid thus obtained the Chairman had expected to be able to draft the Code and submit it to the members of the Committee in time to be acted on at this meeting. The week set apart for this work was unavoidably taken up by other duties and the Committee is reluctantly compelled to ask the indulgence of the Association until its next meeting." The request for further time was granted.

LEGISLATIVE DUTIES DELAY CODE

The Alabama Bar Association held its seventh annual meeting at the State Capitol in 1884. When the report of the special committee on a Code of Ethics was reached and asked for, Col. Jones was absent. Gov. Thomas Hill Watts, formerly Attorney-General of the Southern Confederacy, stated that Col. Jones was in debate on the floor of the State Legislature and therefore moved a postponement of the report.

General Edmund Winston Pettus, a gallant confederate soldier and later the distinguished United States Senator from Alabama for many years, told the association that Col. Jones had prepared a report for his committee, but that his duties in the Legislature were so pressing he had been unable to carefully read and review the copy. On motion of Gen. Pettus, consideration of the report was postponed. It was or-

dered printed in pamphlet form and sent to each member of the Association with the request that they read it, be ready to discuss it and make suggestions at the next meeting of the Association.

Again at the eighth annual meeting of the Association at Montgomery in 1885, the Secretary of the Association stated, when the report of the special committee was called for, that Col. Jones was engaged in the United States Court. The Secretary said that a Code of Ethics had been drafted by Col. Jones and that if he could get to the meeting he would present it. Unfortunately professional duties prevented Col. Jones from attending the meeting and the report went over for another year.

LOSS OF PART OF CODE

Montgomery again entertained the Association when it held its ninth annual meeting in the Supreme Court room at the State Capitol. The report of the committee on the Code of Ethics was set for the afternoon session of Wednesday, December 2, 1886. At that time Col. Troy, a member of the committee, arose and stated that the report of the committee appointed to prepare a Code of Legal Ethics had been passed over from the day before. "But," said Col. Troy, "Col. Jones, as chairman of that committee, requested me on yesterday to state to the Association that he would have the report ready by today, but he is Speaker of the House and regarded it as important that he should be in the House during the morning session. The afternoon session, which is not of much consequence, he felt that he could absent himself from. He requested me to ask the Association to allow him to present his Code at four o'clock this afternoon. I move, therefore, that this report be postponed until four o'clock and be made a special order for that hour." Col. Troy's motion was adopted.

But, alas! The report of the committee was not read when four o'clock that afternoon came. Col. Jones arose and stated that he regretted very much that an accident prevented him from presenting the report. "A portion of it was written off by my shorthand writer," he said, "and he sent it this morning up to the House. It was on my desk at dinner time, but can not be found now. It contains some other matter written by myself. It is impossible at this time to have it re-written or to take it from the notes, so as to present it to the Association, but it can be re-copied in two or three days and furnished to the Secretary to be printed with the proceedings. I have made diligent search for it and some other papers I had on my desk, put they have disappeared. Under the circumstances the committee is unable to report. We worked diligently on it, and I regret it can not now be presented." The Speaker's desk was near a window, and it seems that part of the Code of Ethics was blown out through the window and lost.

So the consideration of the Code was again postponed. However, the Code was ordered to be printed in a pamphlet separate from the proceedings of the Association, and sent to all the members.

FIRST READING OF THE CODE

In 1887 Montgomery again had the privilege of entertaining the annual meeting of the State Bar Association. At the morning session, held December 14th in the hall of the House of Representatives in the Capitol, where a few years later he was to be made governor of Alabama, Col. Jones, as Chairman, read the report of the committee appointed to draft a Code of Legal Ethics. He then, for the first time, read the proposed Code of Legal Ethics in full moving that the committee be discharged and that the further consideration of the report be made a special order for four o'clock that afternoon.

The Association reassembled that afternoon at the stated hour, and at once took up the discussion of the Code of Ethics. After adopting the preamble of the Code it was then discussed section by section. In the printed report of the proceedings of the Tenth Annual Meeting of the Alabama State Bar Association this discussion occupies eleven pages. It begins on page ten of the report and ends on page twenty-one.

ATTEMPTS TO EXERT INFLUENCE ON THE COURT

Section 3 of the committee's report, which is now the third canon of Professional Ethics of the American Bar Association, reads as follows:

"Marked attention and unusual hospitality to a judge, when the relations of the parties are such that they would not otherwise be extended, subject both judge and attorney to misconstruction, and should be sedulously avoided. A self-respecting independence in the discharge of the attorney's duties, which at the same time does not withhold the courtesy and respect due the judge's station, is the only just foundation for cordial personal and official relations between bench and bar. All attempts by means beyond these to gain special personal consideration and favor of a judge are disreputable."

The discussion of this section takes up two printed pages. Mr. Semple, in his remarks, stated that he would like to know the necessity for that section. "There is no doubt," said he, "about the fact that if there is a common practice, such as is condemned by the rule in order to secure favors from a judge, or from judges, it will be well to put it down."

Senator Pettus spoke in favor of the section as read, saying:

"We are not adopting rules for our guidance here merely because certain practices have become obsolete in the land; we are adopting what we consider a sound code of morals for the practice of the law. If these practices have not obtained, if they are evil, we ought to mention them as being one of the evils of the profession. We all know that such things have happened. Not here, but we all know they have happened. There is not a man at the Bar who has years of experience that has not heard of such a thing—perhaps not in Alabama. Mr.

President, the fact of the matter is, the favorite of the judge is the most detestable animal that ever got out of the woods."

Another member, Hon. L. M. Stone, of Carrollton, supported the section as read. He stated that most of the recommendations of the committee would suggest themselves to any gentleman at the Bar. He thought it important, however, to call these rules to the attention of the younger members of the Bar, "many of them not having the advantages that others have had—not having been trained in the law schools or courts—not having gone through or had those advantages of development that others and more experienced men have had." Col. Jones then took the floor in support of the section. He said:

"That section was put in the Code in view of well known occurrences in the past, which, if members will recall for a moment, will leave no doubt that such abuses have existed in Alabama. When I mention a name everybody will at once confess that there has been in times past a necessity for having and acting upon such a rule. I refer to Busted. There were others whom I might mention. The rule does condemn the pointed and marked hospitality sometimes thrust upon judges by attorneys who would not offer such hospitality to the man if he were not a judge. It warns against such courtesies 'when the relations of the parties are such that they would not otherwise be extended.' It does not prevent any member of the Bar from extending proper courtesies to a judge. It is intended to prevent such unusual hospitality when the mere man, who holds the judicial office, would not be offered the same treatment. It is intended to discourage efforts by such practices to gain personal friendship with the judge, merely because he is judge. It is a good rule of conduct, and ought to be adopted."

The rule was then adopted without any change.

TRYING TO GET ILLEGAL EVIDENCE BEFORE A JURY

Section 5 of the Code, which is today the 22nd Canon of Professional Ethics of the American Bar Association, stated the rules of candor and fairness which should guide attorneys in their dealings with the courts. That part of the section which declared "knowingly offering evidence which

it is known the court must reject as legal to get it before a jury, under guise of arguing its admissibility," is a deceit and evasion unworthy of a lawyer, brought on much discussion. G. W. Hewitt, of Birmingham, moved to strike that from the rule. Four members of the Association promptly championed the rule as read, and each regarded the rule as eminently proper. Mr. Stansel objected to striking the quoted part, saying that lawyers "will attempt to introduce evidence which they know themselves is utterly illegal. It is simply to affect the jury and obtain a verdict by trickery and deceit, which they could not otherwise get." Col. Jones also supported the section and stated that the rule did not prevent a lawyer from raising a legal point for the bona fide purpose of getting the question passed on by the Supreme Court because then he offers bona fide to raise a question of law. "He does not offer it," said Col. Jones, "for a mean and improper purpose, and that is all the rule means. Now I have seen cases where both lawyers plainly knew that proposed evidence was utterly inadmissible. One attorney will not offer it for this reason. The other attorney offers it for the purpose of getting it in improperly and arguing it before the jury, when he knows it is illegal. That is the class of cases which that section is made to cover—a case where a man knows in his own heart and conscience that he is trying to drive round the law and court, and to get evidence improperly before the jury to get a verdict contrary to law." The motion to strike the rule was lost.

JUSTIFIABLE AND UNJUSTIFIABLE LITIGATION

Section 14 of the proposed Code read as follows:

"An attorney must decline in a civil cause to conduct a prosecution, when satisfied that the purpose is merely to harass or injure the opposite party, or to work oppression and wrong; *but once entering the cause he is bound to avail himself of all lawful advantages in favor of his client, and can not, without the consent of the client, afterwards abandon the cause.*"

On motion of Col. Tompkins the word *must* was substituted for the word *may*, and then, on motion of Col. Jones, the portion of the section italicized above was stricken out. The substance of this rule appears in Canon 31 of the American Bar Association.

TO MAKE A FOOL OF YOURSELF, AN AMERICAN PRIVILEGE

The shortest of the fifty-six sections of the proposed Code was Section 20, which read as follows:

"An attorney should not conduct his own cause."

When this rule was read, Mr. Alex T. London, of Montgomery, afterwards of Birmingham, stated that he did not see any objection to it. "But," he stated, "it is one of the American privileges to make a fool of yourself and it is guaranteed by the Constitution, and I do not see anything wrong in it—anything immoral in it, and I move to strike the rule out." So that rule was stricken out.

The section of the Alabama Constitution that Mr. London referred to is found in the Bill of Rights of 1875, where it is stated "that no person shall be debarred from prosecuting or defending before any tribunal in this state by himself or counsel any civil cause to which he is a party."

The discussion being then over, the Code was adopted as a whole. It appears that there were then 795 lawyers in Alabama, and that only half of them were members of the Association. However, it was desired to give the widest publicity to the Code and one thousand copies were ordered printed. The Secretary was ordered to mail one copy to every lawyer in the state and to each of the judges of the courts of record. The Code as thus adopted was printed for the first time as an appendix to the report of the 10th Annual Meeting of the Alabama State Bar Association.

FIRST CODE OF LEGAL ETHICS ADOPTED IN UNITED STATES

Thus the Code as read by Col. Jones, without any model or guide, though he had read Judge Sharswood's Essay, was adopted without change except in two minor particulars, and the Alabama State Bar Association has the very distinguished honor and notable distinction of having adopted on December 14, 1887, the first Code of Legal Ethics ever adopted in this country.

A happy incident in connection with the Code of Legal Ethics came over twenty years after its adoption when printed and framed copies of the code were presented to all the courts in Alabama, as a gift from the Alabama State Bar Association and were hung on the walls of the various court rooms throughout the State.

A writer in the Alabama Law Journal (issue October, 1925, Vol. 1, No. 1, page 24) tells of the incident in the following language:

"One hot summer day in 1907 the United States District Court for the Northern Division of the Middle District of Alabama was in session in the United States Court Room at Montgomery.

"On the bench, as presiding judge, sat an ex-Confederate Soldier, one who had followed Lee and Jackson in the Sixties; a former Speaker of the House of Representatives, a governor of Alabama for two terms, a former president of the State Bar Association he was, and since 1901, by appointment of Theodore Roosevelt, President of the United States, he had been judge of the United States District Courts for the Northern and Middle Districts of Alabama. The judge was Thomas Goode Jones.

"There was a noise at the door of the court room. An alert bailiff opened it, and in walked Mr. Alexander Troy, secretary of the Alabama State Bar Association, with a large framed document under his arm. He came charged with the duty of presenting to the court a copy of the Code of Ethics of the Alabama State Bar Association. As soon as his mission was known, Judge Jones suspended the regular court proceedings, and Mr. Troy in a brief, interesting address presented a copy of the code.

" 'Your honor,' he said after explaining the action of the State Bar Association, in presenting a copy of the code to every court in the

State, 'if one's literary productions are the children of his brain, then, in presenting this Code to your honor, and asking its acceptance, I feel that I am but presenting you with one of your own children.'

"The remarks of Mr. Troy were peculiarly apt, for the code which he presented to Judge Thomas G. Jones of the United States District Court on that day in 1907, was the same code which Major Thomas G. Jones wrote, and which was adopted by the Alabama State Bar Association in 1887. It was the first code of legal ethics ever adopted in the United States."

BECOMES FOUNDATION OF AMERICAN BAR ASSOCIATION CANONS

Since Alabama in 1887 adopted the first Code of Legal Ethics, ten states have followed her lead, and in each of these states the codes are formulated, almost *totidem verbis*, upon that of Alabama.

In 1903 the Chairman of the committee in charge of reporting on a Code of Legal Ethics for the Kentucky Bar said in his report:

"Anyone who is familiar with the little book of Judge Sharswood on 'Legal Ethics' will readily see how large a part of this (the Alabama Code) has been drawn from that source. Many of its maxims have been transferred word for word from Sharswood's treatise, and this is certainly its best recommendation."

However, the report of the committee of the American Bar Association on a Code of Professional Ethics (1907) called attention to the fact that:

"While Sharswood's *Essay on Professional Ethics* was doubtless the inspiration for the Alabama Code, the profession is nevertheless indebted for that Code's existence to the initiative of Col. Thomas Goode Jones, afterwards Governor of Alabama, and now United States Judge for the Middle District of Alabama, who in 1881 suggested the adoption of a Code of Professional Ethics by the State Bar Association and afterwards compiled it."

The above quoted report of the American Bar Association's Committee on a Code of Professional Ethics begins at page 676 of the transactions of the 30th Annual Meeting held at Portland, Maine, and continues through page 736.

It is one of the ablest and most comprehensive reports ever rendered by a committee of that association.

The report of the committee was presented by Col. Thomas Hamlin Hubbard, an eminent attorney of New York City. In the course of his remarks he said, after mentioning the Louisiana Code:

"The associations in the other eleven states have a code prepared in 1887, by Judge Thomas Goode Jones, a gentleman who was distinguished as an officer in the Confederate service, who was afterwards Governor of Alabama, and who is now Judge of the United States District Court for the Middle District of Alabama. Judge Jones prepared this code for the Alabama State Bar Association. It was substantially adopted in ten other states; it was slightly extended in some and in others slightly contracted. In all it seems to have been carefully discussed and considered.

* * *

"The report which I now present gives the Alabama Code and the variations made by the ten associations other than the association of the State of Alabama that have followed it. So that you have before you in this report, as we think, the substance of all that is needed to prepare canons of ethics and you have in the main a form which may safely be adopted; for manifestly, it is safer to follow a good precedent if one has been made than to establish a new one."

Col. Hubbard's committee requested that it "be continued and enlarged by the addition of Judge Thomas Goode Jones, author of the Alabama Code which with but few alterations has been adopted by the Bar Associations of eleven states."

The committee also asked that Mr. Justice Brewer, of the Supreme Court of the United States, Hon. Alton B. Parker, of New York, retiring president of the Association, and Hon. Jacob M. Dickinson, of Illinois, and also Hon. George R. Peck, who as president of the Association appointed in 1905 the initial committee on the subject of professional ethics, be made members of the committee. On motion of Roscoe Pound this resolution of the Committee was adopted.

With the addition of these distinguished lawyers, the membership of the committee numbered fourteen. This committee, which prepared the Canons of Professional Ethics adopted by the American Bar Association at its 31st Annual Meeting at Seattle on August 27, 1908, was composed of the following: Henry St. George Tucker, Virginia, Chairman; Lucien Hugh Alexander, Pennsylvania, Secretary; David J. Brewer, District of Columbia; Frederick V. Brown, Minnesota; J. M. Dickinson, Illinois; Franklin Ferriss, Missouri; William Wirt Howe, Louisiana; Thomas H. Hubbard, New York; James G. Jenkins, Wisconsin; Thomas Goode Jones, Alabama; Alton B. Parker, New York; George R. Peck, Illinois; Francis Lynde Stetson, New York; Ezra R. Thayer, Massachusetts.

FINAL REPORT OF COMMITTEE

The committee of the American Bar Association made its final report on Thursday, August 27th, 1908.¹ This report was presented to the Association by Hon. Jacob M. Dickinson, who later served as Secretary of War in the Cabinet of President William Howard Taft. The discussion takes up thirty-two printed pages of the report of the American Bar Association hereinabove mentioned, and will be found on pages 55 to 86 of Volume 33.

In its 1908 report the committee, paragraph four, paid tribute to the Alabama Code and its author, using these words:

"The foundation of the draft for canons of ethics, herewith submitted, is the code adopted by the Alabama State Bar Association in 1887, and which, with but slight modifications, has been adopted in eleven other states. The committee in this connection desire to record their appreciation of the help they have received in this work from their fellow member, Honorable Thomas G. Jones, of Alabama, who was the draftsman of the Alabama code of ethics, and who attended the three days' session of your committee in Washington, March 30 to April 1,

¹ See Vol. 33, REPORTS OF THE AMERICAN BAR ASSOCIATION (1908) 567-586.

1908, and moved the adoption of a number of your committee's modifications of the Alabama code drafted by him more than a score of years ago."

While it would extend this paper to an undue length to make a full comparison of the various sections of the Alabama lawyer's code of ethics and the canons of Ethics of the American Bar Association, these instances will show how closely the latter follows the former:

Section 13 of the Alabama code of ethics, relating to the defense of those charged with crime reads:

"An attorney can not reject the defense of a person accused of a criminal offense, because he knows or believes him guilty. It is his duty by all fair and honorable means to present such defenses as the law of the land permits, to the end that no one may be deprived of life or liberty, but by due process of law."

The fifth Canon of Professional Ethics of the American Bar Association, on the same subject, reads:

"It is the right of the lawyer to undertake the defense of a person accused of crime regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound *by all fair and honorable means, to present every defense that the law of the land permits to the end that no person may be deprived of life or liberty, but by due process of law.*"

The italicized parts of the fifth canon of the American Bar Association follow the words of the Alabama section.

Another illustration, taken at random from the two codes of ethics, will show that in many instances the words of the Alabama code of ethics were adopted almost *ipsissimis verbis*. I quote first section 18 of the Alabama code, and follow it by quoting the nineteenth canon of the American Bar Association:

"18. When an attorney is a witness for his client except as to formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the cause to another counsel. Except

when essential to the ends of justice, an attorney should scrupulously avoid testifying in court on behalf of his client, as to any matter."

"19. When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client."

COL. JONES'S PROPHECY

Col. Jones, in making his suggestion for a Code of Legal Ethics to the Alabama State Bar Association in 1881, and urging the adoption of such a Code, used these words:

"The lawyer who shall frame such a Code need ask no greater or more enduring fame."

He was then thirty-seven years old, and probably little realized as he wrote the quoted words, that he would have the honor and distinction of being the author of that Code, the Code which the future was to witness adopted in ten states of the Union, and then become the foundation for the Canons of Professional Ethics of the greatest association of lawyers in the world.

The Alabama Code of Legal Ethics is the child of his brain, and though perhaps he asked "no greater or more enduring fame," yet ere his long and useful life closed among the people of his state, whom he loved, in his record as an able statesman, a wise governor and a just and fearless judge, he earned "more enduring fame."

Walter Burgwyn Jones.

Montgomery, Alabama.